BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KATHLEEN J. EASTER Claimant VS. **BOEING COMPANY** Respondent AND **INS. CO. OF THE STATE OF PA.** Insurance Carrier	)	Docket No. 1,004,230

ORDER

Respondent requests review of a preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes on August 9, 2002.

ISSUES

The Administrative Law Judge (ALJ) found claimant's work activities aggravated, accelerated or intensified her preexisting cervical disc problems and therefore designated Drs. Paul S. Stein and Eustaquio Abay as the authorized treating physicians as well as ordering their bills paid as authorized medical expenses. And the respondent was ordered, beginning May 29, 2002, to pay claimant temporary total disability compensation.

Respondent argues the uncontradicted medical evidence establishes that claimant's need for medical treatment was a direct, natural and probable consequence of her preexisting injuries suffered in a non-industrial automobile accident.

Respondent raised the following issues on review: (1) whether claimant's accidental injury arose out of and in the course of employment; (2) whether claimant's increased pain symptoms while working caused a compensable injury as defined by K.S.A. 44-508(e); (3) whether the ALJ exceeded her jurisdiction in granting medical and temporary total disability compensation; and, (4) whether the ALJ exceeded her jurisdiction ordering payment of medical bills that were not introduced at the hearing.

Claimant argues she has met her burden of proof that her work activities not only aggravated her preexisting cervical problems but also caused a new and distinct injury at a different level of her cervical spine.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

It is undisputed that claimant had received medical treatment from Dr. Abay for a non-work-related injury to her cervical spine. During the course of treatment Dr. Abay recommended neck surgery in 1998 at the C4-5 and C5-6 level. Claimant did not immediately have the recommended surgery. Surgery was later scheduled on two separate occasions but for personal reasons the claimant was forced to cancel each scheduled surgery. But claimant received ongoing treatment from Dr. Abay as well as chiropractic care for her continuing neck complaints.

On October 12, 2001, claimant was advised she was going to be laid off. On October 19, 2001, while performing her job duties as a material processor, which consisted of lifting and loading supplies that weighed between 70 and 80 pounds, claimant experienced pain in her neck and shoulders. Although claimant had been experiencing pain in her neck and shoulders she said the pain worsened on October 19, 2001. She reported her injury to respondent's plant medical staff. But at a regularly scheduled visit to her chiropractor on the same date the claimant indicated her pain was improved from prior visits and she did not indicate any exacerbation. And her self assessment of pain steadily improved at her subsequent visits to the chiropractor through December 2001.

A cervical MRI was performed on claimant on November 1, 2001, which revealed the preexisting problems at the C4-5 and C5-6 levels as well as a right posterior lateral disc protrusion causing some mass effect upon the right neural foramen at C6-7. It was noted the right posterior lateral disc of C6-7 represented a change from the previous MRI study done on November 29, 1999, which had only noted degenerative changes at C6-7.

At an office visit with Dr. Abay on November 6, 2001, it was noted claimant had been seen in 1999 regarding neck pain and surgery for that condition was canceled. It was further noted "she is having the same type of pain in the neck and bilateral shoulders . . ."[1] Surgery was again recommended. There was no mention of any work related component to her neck pain.

[1] P.H. Trans., Cl. Ex. 1.

Claimant received chiropractic treatment on many occasions and prior to receiving her layoff notice she never indicated that her work was causing any problems regarding her ongoing treatment for her neck pain.

On November 7, 2001, claimant reported to her supervisor that she was experiencing pain in her neck and shoulders. When she went to the plant medical staff she was placed on temporary restrictions against reaching out more than 18 inches, no overhead work as well as weight restrictions. When she gave these restrictions to her supervisor she was told if she needed help to ask. But claimant noted there was never any help available to assist lifting the supplies. Claimant continued performing her regular job duties through December 14, 2001, when she was laid off.

Respondent initially agreed to authorize Dr. Stein to provide treatment for the C6-7 finding but denied any treatment related to the C4-5 and C5-6 levels. Dr. Stein reported that claimant's work activities may have aggravated her symptomatology although it was not the cause of the underlying pathologic process. In response to further inquiry from respondent's counsel, the doctor marked next to a prepared response that claimant's need for surgery was the natural and probable consequence of her preexisting condition instead of her strenuous work activities.

On May 29, 2002, Dr. Abay performed a surgical C4-5-6-7 anterior cervical diskectomy with fusion on claimant.

It is undisputed that claimant had a non-work-related preexisting condition in her cervical spine for which surgery had twice been scheduled. The issue in this claim is whether that condition was aggravated, accelerated or intensified by her work activities for respondent.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[2] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[3] When the accidental injury is shown to arise out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[4] An injury is not compensable, however, where the worsening or new injury would

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[2] *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971).

[3] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

[4] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[5]

Although claimant testified that her neck problems worsened with work, the contemporaneous chiropractic records, although cryptic, do not corroborate her assertion of a worsening condition. Instead, her pain self assessment for that time period indicated a steady improvement of her condition. And the record of her office visit with Dr. Abay on November 6, 2001, indicated that her neck pain was the same as when surgery had been recommended in 1999.

While claimant worked she had continued treatment for her neck complaints. But she never advised the health care providers that her condition was worsened by any work-related incidents. And she did not complain of any such incidents or problems at work until a week after she was notified she was going to be laid off.

It is significant that the sole medical evidence provided at the preliminary hearing regarding whether claimant's condition was aggravated by her work was Dr. Stein's indication that claimant's need for surgery was a direct, natural and probable consequence of her preexisting non work-related condition. And the surgery performed was the same that had been twice scheduled before any allegations of a work-related aggravation.

The Board is not unmindful that there were additional findings at the C6-7 level. But the previous MRI done on November 29, 1999, had indicated degenerative changes at that level and Dr. Stein's sole medical opinion on causation indicated the need for surgery was not related to work.

Based upon the record compiled to date, the Board concludes the claimant has failed to establish that during her employment with respondent she suffered a work-related aggravation to her preexisting neck condition. Because claimant has failed to establish the relationship between the alleged work-related accident and her present need for medical treatment, the request for benefits should be denied. The Board finds, for the purpose of preliminary hearing that the determination that claimant is entitled to benefits is reversed.

But claimant is not without a remedy. As provided by the Workers Compensation Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.[6]

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[5] *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997); *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P.2d 697 (1973).

[6] K.S.A. 44-534a(a)(2).

AWARD

WHEREFORE, the Board reverses Nelsonna Potts Barnes' August 9, 2002 preliminary hearing Order and denies claimant's request for benefits.

IT IS SO ORDERED.

Dated this _____ day of April 2003.

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BOARD MEMBER

c: Randall J. Price, Attorney for Claimant
Kim R. Martens, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Director, Division of Workers Compensation